Luncheon Speech by the Mr Rimsky Yuen, SC
Secretary for Justice
IPBA – CIC Conference 2015
"Impact of Changing Statutory Regimes on the Construction Industry" on 10 September 2015

Mr. Christopher To, Distinguished Guests, Ladies and Gentlemen,

First of all, may I express my gratitude to the Inter-Pacific Bar Association and the Construction Industry Council for inviting me to this event and for giving me the chance to address this distinguished audience.

2. The theme of this Conference is “Impact of Changing Statutory Regimes on the Construction Industry”. I understand that this morning my colleague, Mr CK Hon, the Permanent Secretary for Development (Works), has already addressed you on the Construction Workers Registration Ordinance and the proposal concerning security of payment. On my part, I would like to briefly deal with three main areas: (1) dispute resolution; (2) the rights of third parties in the contractual context; and (3) competition.

Dispute Resolution

3. In the context of dispute resolution, a legislation that would immediately spring to one’s mind is the Arbitration Ordinance (Cap. 609). I trust that all of you here are familiar with its provisions. Hence, instead of addressing you on the legislative regime established under the Arbitration Ordinance, I will only highlight some of the latest development.

4. As you are aware, the current Arbitration Ordinance came into effect in June 2011. The Ordinance has unified the previous separate domestic and international arbitration regimes on the basis of the 2006 version of the UNCITAL Model Law on International Commercial Arbitration ("the Model Law"). Since its enactment, the Department of Justice has been working closely with the arbitration community to update our arbitration regime from time to time to ensure that the latest developments can be promptly incorporated into our legislation. Accordingly, amendments were introduced in 2013 to allow judicial enforcement of emergency relief granted by an emergency arbitrator before an arbitral tribunal is constituted.

5. In July this year, legislative amendments to the Arbitration Ordinance were introduced to clarify a concern in the arbitration community that parties opting for domestic arbitration, which is not uncommon in the construction context, would be allowed to decide on the number of arbitrators whilst retaining their right to seek the Court's assistance on matters set out in Schedule 2 to the Arbitration Ordinance including consolidation of arbitrations (an area which is of particular relevance to construction disputes).

6. Looking to the future, I would like to first highlight the study currently undertaken by a subcommittee of the Law Reform Commission concerning third party funding for arbitration. In Hong Kong, issues concerning third party funding for court litigation are governed by the law of maintenance and champtery. However, arbitration (especially international arbitration) has unique features that are different from court litigation. Besides, in overseas jurisdictions such as Australia, third party funding for arbitration is not uncommon. It is against this background that the Law Reform Commission is looking into the question of

introducing legislation to allow third party funding for arbitration. A draft consultation paper is being prepared and the intention is publish the paper for public consultation in the near future.

7. Another area of possible law reform in the context of dispute resolution is the proposed apology legislation. Researches and experiences in various overseas jurisdictions show that a timely apology may assist in starting a sympathetic dialogue between parties in dispute, prevent a dispute from escalating into litigation and, where litigation or arbitration has commenced, facilitate an earlier settlement.

8. The consultation paper on Enactment of Apology Legislation in Hong Kong was issued by the Steering Committee on Mediation in June this year. The main objective of the proposed apology legislation, which will be confined to the context of civil disputes, is to promote and encourage the making of apologies in order to facilitate the settlement of disputes by clarifying the legal consequences of making an apology. In short, the intention is that an apology will not be admissible as evidence for the purpose of establishing liability or assessing quantum.

9. The legislation, if enacted, would facilitate the early resolution of disputes in construction-related civil proceedings including personal injuries actions. The Steering Committee has received extensive support for the proposed apology legislation from relevant stakeholders. It is currently reviewing the feedback received and will consider how best to take the recommendations forward.

Contracts (Rights of Third Parties) Ordinance (Cap. 623)

10. The second area that I would like to highlight is the Contracts (Rights of Third Parties) Ordinance which will come into operation on 1

January 2016. Following the recommendation of the Law Reform Commission, the legislation was proposed to reform one key aspect of the doctrine of privity, namely, that a person who is not a party to a contract cannot acquire and enforce rights under the contract. The Ordinance will apply to contracts entered into on or after its commencement.

11. The Ordinance provides for a two-limb test: (a) a third party may enforce the contract if the contract contains an express term to that effect; or (b) if the contract contains a term which purports to confer a benefit on the third party, that party may enforce that term unless on a proper construction of the contract, the parties to the contract do not intend that the third party may do so. The satisfaction of either limb will permit a third party who is not a party to the contract to enforce it. It follows that parties to a contract can expressly exclude the application of this new statutory scheme in their contract (if they so wish).

12. Sometimes, a third party may need to enforce a substantive term of the contract by resorting to arbitration. Under Section 12 of the Ordinance, where a third party's right to enforce a contract term will be subject to an arbitration agreement, as regards the dispute between the third party and the promisor relating to the enforcement of the term by the third party, the third party will be treated as a party to the arbitration agreement of the purposes of the Arbitration Ordinance.

13. The Government considers that the Ordinance would remove the anomalies of the common law doctrine of privity of contract. The Ordinance would allow the contracting parties the freedom to confer an enforceable right on a third party if they so wish. It would be up to the parties to formulate terms of their contracts which fit their needs, including the specific needs of a particular industry or type of contract.

The Ordinance would not *per se* increase liabilities to contracting parties (such contractors or subcontractors) but would provide a third party with a more convenient channel to enforce his rights under a contract as opposed to collateral warranties.

Competition Ordinance (Cap. 619)

14. The last area that I would like to cover is the statutory regime on competition. I understand that later this afternoon, you will be hearing from Mr. Justice Godfrey Lam and other experts in this field. Hence, I would only highlight a few features.

15. The Competition Ordinance was enacted in June 2012 with phased commencement. Amongst others, the Competition Ordinance contains two conduct rules which will apply only to economically active entities or, to use the technical term, "undertakings":

(1) The first conduct rule in Section 6 prohibits agreements, concerted practices and as a member of an association of undertakings such as a trade association, making or giving effect to a decision of the association if the object or effect is to prevent, restrict or distort competition in Hong Kong.

(2) The second conduct rule in Section 21 prohibits the abuse of a substantial degree of market power by engaging in conduct that has as its object or effect the prevention, restriction or distortion of competition in Hong Kong.

16. The term "agreement" under the first conduct rule is widely defined to include any agreement, arrangement, understanding, promise or undertaking, whether express or implied, written or oral and whether

or not enforceable or intended to be enforceable by legal proceedings.

17. Judging from international experience, it seems that the focus of enforcement in the construction industry is likely to be under the first conduct rule in relation to cartels, involving what is defined in Section 2(1) as “serious anti-competitive conduct”. Broadly speaking, this involves: (1) price fixing in its many forms; (2) bid rigging (as opposed to joint tendering), for examples, agreeing who will win or to withdraw a bid, agreeing the submission of artificially high or ‘cover bids’ or bids on unacceptable terms to secure the agreed result, or simply agreeing not to bid at all “this time”; (3) market sharing whether by division of geographic territory, sector or individual customers; and (4) output or supply limitations.

18. Bid rigging may fall outside the section 2(1) definition of “serious anti-competitive conduct” if “made known to the person calling for or requesting bids” at or before the time of submission or withdrawal of the bid but may still fall within the first conduct rule if it has the object or effect of harming competition.

19. Conduct in contravention of the first conduct rule, which is not serious anti-competitive conduct enjoys a *de minimis* exemption if the combined turnover of the undertakings involved in the preceding financial year is not more than HK$200 million (Schedule 1, para 5) and proceedings cannot be brought without first issuing a “cease and do not repeat” Section 82 warning notice.

20. The first conduct rule does not apply to agreements between legal persons that form a single economic entity, such as between a parent company and its subsidiaries or between sister companies under common control.

21. The second conduct rule requires abuse, not just the possession of substantial market power and potentially addresses exclusionary and exploitative unilateral conduct, such as predatory pricing (essentially pricing below cost to foreclose or exclude competition), tying and bundling without justification and refusal to supply or only supplying on unreasonable terms.

22. In 2013, the Competition Commission was established with powers to investigate and seek remedies or penalties from an independent Competition Tribunal (which was established in 2013 as a superior court of record). The Commission has prepared guidelines, indicating the manner in which it expects to interpret and give effect to the conduct rules. On the whole, we believe that the Competition Ordinance will help to facilitate fair competition in the business environment in Hong Kong, including the construction industry. Fair competition in turn is important in maintaining Hong Kong's competitiveness as well as sustainable development.

Concluding Remarks

23. Ladies and gentlemen, the purpose of enacting legislation is not to control human activities for the purpose of control. Rather, the purpose is to provide appropriate legislative frameworks so as to facilitate economic and other forms of human activities. It is with this aim in mind that the Government has taken steps to enact legislation so that disputes can be resolved in a fair and effective manner, the rights of third parties can be effectively dealt with in the contractual context and the business community can compete on a level playing field. The Government will continue to review and update our statutory regimes so as to achieve all these objectives, and we welcome views and suggestions

from all stakeholders.

24. On this note, it remains for me to wish this Conference every success. Thank you.